Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

NICKY M. HIGGINS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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DECEMBER 1988

QUESTION PRESENTED

Did the United States Court of Military Appeals err as a matter of law by holding that the time period required to process the petitioner's tender of resignation in lieu of court-martial was excludable from government accountability under Rule for Courts-Martial 707(c)(8) as a delay for good cause?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Nicky M. Higgins, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 27 M.J. 150 (C.M.A. 1988) (Appendix A). An unreported decision of the Air Force Court of Military Review was rendered on June 4, 1987 (Appendix B).

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on October 17, 1988. The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h)(Supp III 1985) and 28 U.S.C. § 1259(3)(Supp III 1985).

REGULATORY PROVISION INVOLVED

Rule 707* of the Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984 ("M.C.M., (1984)") provided, in pertinent part:

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Notice to the accused of preferral of charges under R.C.M. 308; or

(2) The imposition of restraint under R.C.M. 304(a)(2)-(4).

* * *

(c) *Exclusions.* The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run—

(1) Any periods of delay resulting from other proceedings in the case, including:

(A) Any examination into the mental capacity or responsibility of the accused;

(B) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial;

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with

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* R.C.M. 707 has been amended and the portion relevant to this case, which will herein be cited as R.C.M. 707(c)(8), is now contained in R.C.M. 707(c)(9), M.C.M. (1984) (Ch. 3 effective March 12, 1987).

the knowledge that it was totally frivolous and without merit; and

(E) Any petition for extraordinary relief by either party.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.

(5) Any period of delay resulting from a delay in the Article 32 hearing or a continuance in the court-martial at the request of the prosecution if:

(A) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution's case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a coaccused as to whom the time for trial has not yet run and there is good cause for not granting a severance.

(8) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

Paragraph 2-22, Air Force Regulation 36-12 (1 October 1984), Administrative Separation of Commissioned Officers, Chapter 2, Section D, provided:

2-22. Trial Pending Action on Application. If formal charges have been preferred prior to final decision on a tender of resignation under table 2-8, the trial ordinarily should be postponed pending final action on the resignation. If, for any reason, it is determined that trial should proceed before notification of final action, obtain prior authorization from HQ USAF/JAJM, 1900 Half Street, S.W., Washington DC 20324. Direct communication by quickest means is authorized.

STATEMENT OF THE CASE

Petitioner, an Air Force Captain and dentist, was tried by a general court-martial with members at Goodfellow Air Force Base, Texas. He was convicted, pursuant to his pleas, of violating two orders, wrongfully using meperidine, and larceny, in violation of Articles 90, 112a, and 121, Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. §§ 890, 912a, and 921, respectively. The court sentenced him to be dismissed from the service, to forfeit all his pay and allowances and to pay a $5,000 fine.

At trial, defense counsel, contending the 120 day speedy trial rule embodied in R.C.M. 707(a) had been breached, moved to dismiss all charges. The facts in respect to this motion were not in dispute. The stipulated chronology reflects that a period of 187 days elapsed between the date charges were preferred and the first day of trial. It was conceded that the defense had requested four delays during various stages of the pretrial process and therefore was accountable for a total of 49 days out of this period, leaving a period of 138 days in issue. (R. 22).

At issue was whether the time period between July 11, 1986, the date on which petitioner tendered his resignation for the good of the service under Air Force Regulation 36-12, and October 17, 1986, the date on which the Secretary of the Air Force declined this resignation, or any part thereof, was excludable under either R.C.M. 707(c)(3) as a delay "at the request or with the consent of the defense" or under R.C.M. 707(c)(8) as a "delay for good cause."

The defense position on this motion was that "there was no delay requested or consented to by the defense sufficient to lessen the period beyond the 120 days allowed." (R. 12). In opposing the motion, trial counsel offered two alternative positions as to why the period of July 11, 1986 to October 27, 1986 was excludable. First, his primary position was that "under R.C.M. 707(c)(3), the filing of a resignation request by the accused in this case was a defense generated delay." (R. 16). His fall back position was that, in any event, petitioner's tender of resignation resulted in a "delay for good cause" under R.C.M. 707(c)(8) for the period during which the resignation was pending.

The military judge endorsed the trial counsel's legal analysis *in toto*. *United States v. Higgins, supra*, 27 M.J. at 151-153; Pet. App. 4a-7a. On June 4, 1987, the Air Force Court of Military Review disagreed and overturned

petitioner's conviction, finding that the government failed to bring the petitioner to trial within the 120 day time limit established by R.C.M. 707, M.C.M. (1984). *United States v. Higgins*, ACM 25829 (A.F.C.M.R. 1987), Appendix B. The Court of Military Review completely disagreed with the analysis articulated by the trial judge. The Judge Advocate General then certified the two issues for review to the United States Court of Military Appeals.

On October 17, 1988, the Court of Military Appeals rendered an opinion, reversing the lower court and ruling that the time required to process petitioner's resignation in lieu of court-martial would be excluded from the 120 day period for speedy trial purposes. *United States v. Higgins, supra*, 27 M.J. 153, 154. The Court relied solely upon R.C.M. 707(c)(8) which excludes periods "for good cause, including unusual operational requirements and military exigencies." This ruling reduced the total elapsed days from preferral of charges to trial to within the 120 day period set under R.C.M. 707. The Court of Military Appeals did not rule on the applicability of R.C.M. 707(c)(3), delay "at the request or with the consent of the defense."

REASONS FOR GRANTING THE WRIT

I

THE BROAD CONSTRUCTION GIVEN TO THE TERM "DELAY FOR GOOD CAUSE" IN THIS CASE OF FIRST IMPRESSION IS UNWARRANTED AND SERVES TO UNDERMINE THE ENTIRE SPEEDY TRIAL FRAMEWORK.

Petitioner's case presented the first opportunity for the Court of Military Appeals to construe the meaning of "delay for good cause" under R.C.M. 707(c)(8). In seizing this opportunity, the Court made no reference to four significant decisions, narrowly construing this term, rendered by the Air Force, Navy-Marine and Army Courts of Military Review. *United States v. Miniclier*, 23 M.J.

843 (A.F.C.M.R. 1987); *United States v. Harris*, 20 M.J. 795 (N.M.C.M.R. 1985); *United States v. Kuelker*, 20 M.J. 715 (N.M.C.M.R. 1985); *United States v. Durr*, 21 M.J. 576 (A.C.M.R. 1985). Furthermore, the Court did not mention or examine such arguably applicable common rules of statutory construction as the doctrine of ejusdem generis and the rule that penal statutes should be strictly construed. Sutherland Stat. Const. §§ 47.17, 59.03. *See, e.g., Owen of Georgia, Inc. v. Shelby County*, 648 F.2d 1084 (6th Cir. 1981) (doctrine of ejusdem generis applied in construing "good cause" provision in civil statute). These traditional rules are designed to assist a court in determining the legislature's intent in enacting a particular statute. They are equally applicable to construing procedural rules prescribed by the President under Article 36, U.C.M.J. *United States v. Sonnenschein*, 1 U.S.C.M.A. 64, 1 C.M.R. 64 (1951). A brief reference in the Court's opinion to the ABA standard and Drafter's Analysis hardly suffices to support the ratio decidendi. *United States v. Higgins, supra* 27 M.J. at 153.

Given the relatively narrow construction of R.C.M. 707(c)(8) rendered by the lower courts of military review, it is difficult to justify the interpretation made by the Court of Military Appeals, particularly where that Court provided an insufficiently analytical basis for its decision. The failure to adequately address the drafter's intent in carving out the exception provided by R.C.M. 707(c)(8) has created a real potential for reading into "delay for good cause" heretofore unimagined exceptions which would tend to eviscerate the very heart of the speedy trial framework. This framework was designed to protect an individual's right to speedy resolution of charges preferred against him and to hold the government accountable for unnecessary and prejudicial delays. Article 10, U.C.M.J.; M.C.M. (1984), Drafter's Analysis, A21-37.

Although the question presented does not require resolution between conflicting appellate court decisions, it remains significant within the realm of military court-martial practice. The military speedy trial framework, in general, and R.C.M. 707(c)(8), in particular, are unique and not likely to be construed by the federal circuit courts of appeals. The "good cause" exception carries such potential for abuse that its proper construction in this case of first impression is essential to the continued vitality of the speedy trial protections afforded an accused. The Court of Military Appeals' decision in petitioner's case, if left to stand, is a major crack in the speedy trial dike.

II

A TENDER OF RESIGNATION IN LIEU OF TRIAL IS A NORMAL INCIDENT OF TRIAL PRACTICE AND NOT THE TYPE OF UNIQUE EVENT CONTEMPLATED BY R.C.M. 707(c)(8), DELAY FOR GOOD CAUSE.

Petitioner's tender of resignation in lieu of trial by court-martial was submitted through the general court-martial convening Authority to the Secretary of the Air Force pursuant to Air Force Regulation 36-12 (1 October 1984). No requirement exists that final action on the tendered resignation be completed prior to trial. In fact, the Court of Military Appeals held in *United States v. Woods*, 26 M.J. 372 (C.M.A. 1988), that the Secretary of the Army's acceptance, after trial, of a resignation tendered prior to trial served to abate the conviction. This decision supports the conclusion that processing of a tendered resignation is an administrative function separate and distinct from the judicial process. Although a slight distinction may be drawn between Air Force and Army regulations, the Air Force regulation provides a simple mechanism to proceed to trial before final action on a

tender of resignation. The convening authority need only request permission to proceed to trial. Air Force Regulation 36-12, paragraph 2-22. This provision has been part of the regulation since 1952 and is commonly encountered in officer cases. It must be understood that this paragraph *does not prohibit* trial pending action by the Secretary. Apparently the Court of Military Appeals did not recognize this critical distinction. *United States v. Higgins, supra*, 27 M.J. at 153. Needless to say, petitioner's convening authority did not request permission to proceed to trial.

Even if the regulation were construed to allow the Secretary of the Air Force to take control over a case, removing it from the power of the local command, that is not a sufficient basis for freeing the government from speedy trial constraints under a "good cause" artifice. This is so for a number of reasons.

First, Air Force Regulation 36-12 and Rule for Court-Martial 707 were both promulgated under the authority of the President, the Commander-in-Chief. Both the Secretary of the Air Force and the general court-martial convening authority derive their power from the President. To free one delegee of that power from responsibility for complying with rules established by the President, because of the acts of another delegee of that power, when both delegees should be acting in concert, amounts to nothing more than a shell game. It is only reasonable to require that these delegees of power exercise their powers harmoniously, responsibly and judiciously, rather than in a manner which subverts the rights of an accused.

Second, by applying traditional rules of statutory construction, R.C.M. 707(c)(8) can only be interpreted in such a way that it does not encompass tenders of resignation submitted by officers. No doubt, the five Air Force Court

of Military Review judges that ruled on this question, judge advocates all, with combined military justice experience approaching three decades, are familiar with Air Force trial practice. *United States v. Miniclier, supra*; *United States v. Higgins*, ACM 25839, (A.F.C.M.R. 1987). They understood, as the Court of Military Appeals did not, that no reasonable distinction can be drawn between processing an officer's tender of resignation and an enlisted member's request for discharge in lieu of trial. This practice, which has spanned almost four decades, had to be contemplated by the drafters of R.C.M. 707, a rule of relatively recent origin. Judge Sullivan's distinction, that because an enlisted member's request is processed locally, it does not come within R.C.M. 707(c)(8), is thus inconsistent with logic and experience. *United States v. Higgins, supra*, 27 M.J. at 150.

The doctrine of ejusdem generis also supports this conclusion. Sutherland Stat. Const. § 47.17 (4th Ed). Until the Court of Military Appeals issued its decision in this case, no other appellate military court had held that R.C.M. 707(c)(8) covered situations other than "unique" events of a class comparable to those illustrated by the rule, "unusual operational requirements and military exigencies." When the entire list of exclusions under R.C.M. 707(c) is read together with these listed examples included in R.C.M. 707(c)(8), and recognizing that the rule makes no mention of officer resignation tenders, a normal incident of trial practice, the conclusion that "good cause" does not cover such requests is inescapable.

Also supporting this conclusion is the "ancient rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed." Sutherland

Stat. Const. § 59.03 (4th Ed). The Court of Military Appeals, by broadly construing R.C.M. 707(c)(8), has wrongly encumbered petitioner's right to a speedy trial which R.C.M. 707 was designed to protect. An expansive interpretation of delay for good cause "could allow the exception to devour the rule." *United States v. Kuelker, supra* at 176.

CONCLUSION

"Delay for good cause," an amorphous phrase at best, must be given form carefully and consistently. No other term in the speedy trial framework carries such great potential for harm. What otherwise appears to be good, much like the Trojan horse, can easily be engaged for ill purposes, and ultimately may be employed to destroy the entire framework. This Court is the last guardian protecting not only petitioner's speedy trial rights, but the security of the entire speedy trial structure. For the reasons stated, the Court of Military Appeals has failed to construe R.C.M. 707(c)(8) correctly. Petitioner, therefore, requests that this Court grant his petition for a writ of certiorari and affirm the decision of the Air Force Court of Military Review.

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DECEMBER 1988

APPENDICES

APPENDIX A

U.S. Court of Military Appeals

No. 58,190
ACM 25839

UNITED STATES, APPELLANT

v.

NICKY M. HIGGINS, CAPTAIN U.S. AIR FORCE, APPELLEE

Oct. 17, 1988

For Appellant: *Captain Jeffrey H. Curtis* (argued); *Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Captain Marc Van Nuys* (on brief).

For Appellee: *Major Frank J. Spinner* (argued); *Colonel Leo L. Sergi* (on brief).

Opinion of the Court

SULLIVAN, Judge:

On December 8-9, 1986, the accused was tried by general court-martial with members at Goodfellow Air Force Base, Texas. Pursuant to his pleas, he was found guilty of twice violating lawful commands from his superior officers, wrongfully using Meperidine (commonly known as Demerol), and committing larceny, in violation of Articles 90, 112a, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 890, 912a, and 921, respectively. He was sentenced to dismissal, total forfeitures and a

$5,000 fine. After the convening authority approved the sentence except for the fine, the Court of Military Review, on June 4, 1987, set aside the findings of guilty and the sentence and dismissed the charges against him.

On July 1, 1987, the Judge Advocate General of the Air Force pursuant to Article 67(b)(2), UCMJ, 10 U.S.C. § 867(b)(2), requested that we review the decision of the Court of Military Review. He certified for review the following issues:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW IN DISMISSING ALL CHARGES UNDER R.C.M. 707(a) BY HOLDING THAT THE ACCUSED'S REQUEST FOR RESIGNATION IN LIEU OF COURT-MARTIAL DID NOT CONSTITUTE A DELAY AT THE REQUEST OR WITH THE CONSENT OF THE DEFENSE UNDER R.C.M. 707(c)(3).

II

IF THE ANSWER TO ISSUE I IS IN THE NEGATIVE, WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW IN DISMISSING ALL CHARGES UNDER R.C.M. 707(a) BY HOLDING THAT THE TIME PERIOD REQUIRED TO PROCESS THE ACCUSED'S TENDER OF RESIGNATION WAS NOT EXCLUDABLE FROM GOVERNMENT ACCOUNTABILITY UNDER R.C.M. 707(a) AS DELAY FOR GOOD CAUSE PURSUANT TO R.C.M. 707(c)(8).

We conclude that the delay occasioned by the accused's tender of his resignation which occurred as a result of its processing outside the local command was excludable

from government accountability as a delay for good cause within the meaning of R.C.M. 707(c)(8), Manual for Courts-Martial, United States, 1984.[1] *Cf. United States v. O'Brien*, 22 U.S.C.M.A. 557, 48 C.M.R. 42 (1973).

The facts of this case are not in dispute. The parties' chronology stipulates the following:

4 June 1986: Charges preferred.

6 June 1986: Article 32 Hearing.

11 June 1986: Accused placed on administrative hold prior to date of separation (original date for separation was 30 June 1986).

20 June 1986: Article 32 Report completed.

24 June 1986: Accused acknowledges receipt of Article 32 report.

3 July 1986: Defense Counsel acknowledges receipt of Article 32 report.

8 July 1986: Defense Counsel requests delay to 11 July 1986 for response to Article 32 report.

11 July 1986: Date on resignation request.

16 July 1986: Resignation request received by 3480 ABG/DPMQS.

5 August 1986: Referral of charges by GCM.

7 August 1986: Defense Counsel requests 4 day delay to submit additional matters in resignation package.

8 August 1986: GTTC/JA review of resignation request.

11 August 1986: SPCM recommends disapproval of resignation request.

13 August 1986: Resignation request forwarded to GCM.

15 August 1986: Charges as referred by GCM are served on the Accused.

29 August 1986: GCM recommends disapproval of resignation request.

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[1] This provision is now contained in R.C.M. 707(c)(9), Manual for Courts-Martial, United States, 1984 (Ch. 3, effective March 12, 1987).

17 October 1986: Secretary of the Air Force declines resignation request.

October 1986: Case docketed for trial by JAJT-3 for 27 October 1986.

21 October 1986: Defense counsel requests delay from October 27 until [in addition to another delay – December 8, 1986].

Total elapsed days from date of preferral to date of trial (excluding date of preferral per RCM 707): 187

Total days both parties and Accused agree are accountable as Defense delay: 49 (42 of these days are after the trial setting of 27 October 1986)

The period in dispute is the 108 days between July 11, 1986, and October 27, 1986, during which the accused's request for resignation in lieu of court-martial was being processed.

At trial, the military judge made the following ruling as a result of the defense motion to dismiss based upon R.C.M. 707(e):

> I find this entire period of time is accountable to the defense for the following reasons.
>
> First, the resignation provisions contained in Section D, Air Force Regulation 36-12 are designed to allow an accused to seek to avoid trial by courts-martial, a process that could result in a federal court conviction and in some cases, including this one, a punitive discharge, both of which can be detrimental to an individual's economic and social future at the very least.
>
> Two, a conviction for theft of a controlled substance for which the accused was allegedly accountable and use of that controlled substance would undoubtedly result in the withdrawal of the accused's license to practice dentistry while an administrative

discharge would not necessarily, and probably would not, have the same result.

Three, the Government acted in accordance with paragraph 2-22, Air Force Regulation 36-12, in postponing the trial until final action on the resignation.

Four, that although the accused is not required to exhaust administrative remedies in criminal cases, administrative remedies such as a request for resignation are available for use by an accused at his or her option. The accused, in this case, voluntarily elected to exercise that option.

Five, the accused did not make a demand for trial during this time despite the passage of his date of separation and withdrawal of his duties of practicing dentistry. The only conclusion that can be drawn from this is that Captain Higgins also appreciated the benefits to his future of an administrative separation from the service rather than proceed to trial where he would expose himself to a federal court conviction and potentialy a punitive discharge.

As such, I find that the delay from 16 July 1986 to 17 October 1986 was with the consent of the accused, albeit, not affirmatively expressed, thereby qualifying the period to be excluded in accordance with Rule for Courts-Martial 707(c)(3). To hold otherwise defies logic.

I find that processing of the resignation in 94 days is reasonable, particularly in light of the fact that the accused requested a four-day delay in the processing of the resignation from 7 to 11 August 1986 in order to submit additional matters.

Even if it were to be held, as suggested by the Navy-Marine Court of Military Review, that processing of a

resignation is not excludable in accordance with Rule of Courts-Martial 707(c)(3), I find the delay from 16 July 1986 to 17 October 1986 was for good cause pursuant to Rule of Courts-Martial 707(c)(8). In so finding, I have concluded that unusual operating requirements and military exigencies were noted in the subsection as illustrative rather than all inclusive based upon the use of the word, including.

Specifically, I find the delay for good cause as to do otherwise would be to the prejudice of the accused in exposing him to the possibility of a federal court conviction and punitive discharge and their attendant negative ramifications.

It should be noted that I am not persuaded by the fact that the accused has been extended on active duty beyond his original date of separation on 30 June 1986 and, has not been allowed to practice dentistry since 11 February 1986. On the contrary, he has continued to be paid as an active duty member of the Air Force and to enjoy all of the benefits associated with that service. No one is guaranteed he or she will be allowed to continue on in his or her desired duty in the Air Force. Rather, Air Force personnel are switched from one job to another for a variety of reasons both positive and negative on a daily basis.

Accordingly, when all applicable exclusions are deducted from the 187 days since preferral of charges in this case, I find the Government has brought this case to trial well within the time constraints of Rule of Courts-Martial 707.

Although not specifically suggested by the defense, I have also considered the *Burton* rules, Article 10 of the Uniform Code of Military Justice and the Sixth Amendment.

Since the accused was not in any form of restraint prior to trial, I find the *Burton* rules and Article 10 of the Uniform Code of Military Justice are not applicable.

However, I have considered the Sixth Amendment. There has been a lengthy delay in the bringing of the case to trial. However, all but 47 days of that delay are attributable to the defense, nor has the accused asserted his right to a speedy trial at any time during the delay. Even though the accused was kept on active duty beyond his date of separation and prohibited from practicing dentistry during the delay, this prejudice is counterbalanced by the fact that 98 days of the delay were caused by delays either specifically or inferentially requested by the accused prior to the setting of a trial date and 42 days were the result of delays requested by the defense thereafter. It is obvious that one who submits a request for resignation realizes that it will have to be processed, a procedure which took some 94 days in this instance. And, again, I find that a period of 94 days is a reasonable time to process a resignation. Furthermore, it is persuasive that the resignation was submitted after the accused's date of separation and he was removed from the practice of dentistry. Accordingly, I find no violation of the Sixth Amendment.

Under the circumstances of this case then, the motion of the defense to dismiss all charges and specifications in accordance with the Rule for Courts-Martial 707 is denied.

We first note that our disposition in this case is not necessarily controlled by the earlier decision of this Court

in *United States v. O'Brien,* 22 U.S.C.M.A. 557, 48 C.M.R. 42. There, the question was whether a request for administrative discharge in lieu of trial justified delay under Article 10, UCMJ, 10 U.S.C. § 810 and the decision of this Court in *United States v. Marshall,* 22 U.S.C.M.A. 431, 435, 47 C.M.R. 409, 413 (1973). Moreover, that accused was in pretrial confinement, and his request for administrative discharge was finally acted on at the convening authority level. Here, the question was whether a request for administrative discharge in lieu of trial is good cause for delay under R.C.M. 707(c)(8). Also, the accused was not in pretrial confinement and his request for discharge required processing and action beyond the convening authority level. *See* para. 2-3, Air Force Regulation (AFR) 36-12, *Administrative Separation of Commissioned Officers,* Chapter 2, Section D (Oct. 1, 1984).

R.C.M. 707(c)(8) provides that "[a]ny other period of delay for good cause including unusual operational requirements and military exigencies" is excludable from the 120-day period of R.C.M. 707(a). The drafters of this provision generally stated the exclusions contained in subsection (c) of this rule are "taken from ABA Standards," *Speedy Trial,* "§ 12-2.3 (1978) with modifications to conform to military procedure and terminology." Drafters' Analysis, Manual, *supra* at A21-37.

This ABA standard recommends that a residual power be given to civilian trial judges to deal with unique situations not covered in the earlier stated exceptions to the speedy-trial rule. In this light, a request for discharge processed at the local command level might not be considered a unique situation because it simply is "another incident of the normal processes of military justice." *See United States v. O'Brien, supra* at 561, 48 C.M.R. at 46. However, requests required to be processed outside the

command are beyond its control and may impede the disposition of the criminal charges at the local level.[2] *E.g., United States v. Woods,* 26 M.J. 372 (C.M.A.1988). Accordingly, we hold that where the request for administrative separation must be acted on outside the local command, and such a requirement results in the discontinuation of criminal prosecution without defense protest, good cause for delay exists within the meaning of R.C.M. 707(c)(8).

The record in this case reflects the fact that the accused's request for administrative separation was processed by the general court-martial authority along with the criminal charges until August 29, 1986. He then denied this request and forwarded it to the Secretary's office. No further steps were taken by the command in the prosecution of this case, and none was requested by the accused. Para. 2-22, AFR 36-12. The parties next stipulated that this resignation request was denied by the Secretary of the Air Force on October 17, 1986. Absent any allegation or showing of government foot-dragging, we find this period of approximately 49 days can be attributed to the defense and its administrative request. Accordingly, the amount of delay attributed to the Government is well under the 120-day limit of R.C.M. 707(a), and we affirm the well-considered decision of the military judge.

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[2] We note that paragraph 2-22, AFR 36-12, Chapter 2, Section D, specifically provides:

> 2-22. *Trial Pending Action on Application.* If formal charges have been preferred prior to final decision on a tender of resignation under table 2-8, the trial ordinarily should be postponed pending final action on the resignation. If, for any reason, it is determined that trial should proceed before notification of final action, obtain prior authorization from HQ USAF/JAJM, 1900 Half Street, S.W., Washington DC 20324. Direct communication by the quickest means is authorized.

The decision of the United States Air Force Court of Military Review is reversed. The record of trial is returned to the Judge Advocate General of the Air Force for submission to that court for further action under Article 66, UCMJ, 10 U.S.C. § 866.

Chief Judge EVERETT and Judge COX concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 25839

UNITED STATES

v.

CAPTAIN NICKY M. HIGGINS, 461-06-7574 FV
UNITED STATES AIR FORCE

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4 June 1987

Sentence adjudged 9 December 1986 by GCM convened at Goodfellow Air Force Base, Texas. Military Judge: MARK S. ANDERSON.

Approved sentence: Dismissal and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Timothy J. Malloy.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major David F. Barton.

Before

FORAY, MICHALSKI and MURDOCK
Appellate Military Judges

DECISION

FORAY, Senior Judge:

At his trial by general court-martial, with members, the accused was found guilty, pursuant to his pleas, of two offenses of willfully disobeying a command of a superior commissioned officer and one offense of larceny of Meperidine, a controlled substance in violation of Articles 90 and 121, U.C.M.J. The approved sentence extends to a dismissal and forfeiture of all pay and allowances.

At his trial, immediately after the arraignment, appellant unsuccessfully moved to have all the charges against him dismissed by the military judge for lack of a speedy trial guaranteed him pursuant to the provisions of R.C.M. 707. In his sole assignment of error, appellant asks this Court to review the correctness of the military judge's ruling denying that motion.

At the trial, the parties stipulated to the facts regarding the chronology of events relevant to appellant's motion to dismiss. The parties agreed that a total of 187 days elapsed from the date the charges were preferred against the appellant until the date the court-martial convened to try the charges. They also agreed that the appellant had expressly submitted four requests for delays during the period in question which totalled 49 days. Forty two days of the delay requested by appellant occurred after the initial trial date had been established. That initial trial date was the 138th day after charges had been preferred.[1] The appellant contends that those 138 days of delay in the processing of the case are chargeable to the Government, therefore, dismissal of the charges against him is mandated by

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[1] The seven days of delay previously expressly requested by appellant have been deducted in computing the period of time (138 days) which had expired since charges had been preferred.

R.C.M. 707(e). The Government's position is that since appellant tendered his resignation for the good of the service because of the conduct which rendered him triable by court-martial,[2] the 98 days which elapsed from the date the tender was submitted until the date the Secretary of the Air Force declined to accept the tender was a delay chargeable to appellant. It contends that this 98 day period of time should be excluded from its accountability when determining whether the appellant was brought to trial within 120 days after charges were preferred against him as required by R.C.M. 707(a). As it did at trial, the Government again contends that this period is excludable as a delay in the proceeding resulting from the request or consent of the defense allowable under R.C.M. 707(c)(3) or, in the alternative, was period of delay for good cause shown allowable under R.C.M. 707(c)(8). If the Government's position in this regard is correct, this period of delay, coupled with the other periods of delay expressly requested by the appellant, would result in the Government being accountable for only 43 days of delay for speedy trial purposes pursuant to R.C.M. 707(a).

At trial, the military judge adopted the facts as to the chronology of events stipulated to by the parties when ruling on the appellant's motion to dismiss. Among the numerous findings made by the military judge, one was that the appellant had expressly requested delays in the court-martial proceedings totalling 49 days. He also found that this period and the period of 98 days[3] that it took to

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[2] Air Force Regulation 36-12 (1 October 1984), Administrative Separation of Commissioned Officers, Chapter 2, Section D.

[3] Twenty-seven days subsequent to submitting his tender of resignation, appellant specifically requested a delay in the proceedings of four days.

process appellant's tender of resignation for the good of the service to be excludable from Government accountability for speedy trial purposes as delays requested or consented to by the defense under R.C.M. 707(c)(3), even though "not affirmatively expressed" by the appellant.[4] Alternatively, the military judge held that if the period of delay occasioned by the processing of appellant's resignation tender was not excludable under R.C.M. 707(c)(3), it would be an excludable delay for good cause authorized pursuant to R.C.M. 707(c)(8).

The question before us for resolution in this case was before us in *United States v. Miniclier,* 23 M.J. 843 (A.F.C.M.R. 1987). In *Miniclier,* a general court-martial was convened in the accused's officer's case 162 days after the charges against him had been preferred. Immediately after the arraignment, the accused successfully moved for dismissal of all charges against him alleging that he had not been brought to trial within 120 days from the date of the preferral of charges against him as guaranteed him pursuant to R.C.M. 707(a). As was done at the trial in the case before us, the prosecution in *Miniclier,* argued in opposition to the motion to dismiss that the 140 days taken to process the accused's unsuccessful tender of a resignation for the good of the service was either a delay at the request or with the consent of the accused under R.C.M. 707(c)(3) or a delay for good cause under R.C.M. 707(c)(8). The prosecution then argued that, as a result of either allowable time period exclusion, the accused had been brought to trial within 120 days as required by R.C.M. 707(a) and, therefor, the accused's motion to dismiss should be denied. The military judge found, however, that the accused did not, either expressly or im-

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[4] A continuance may be granted only by the military judge. Article 40, U.C.M.J., R.C.M. 906(b)(1).

pliedly, request or consent to any delay by tendering his resignation under R.C.M. 707(c)(3) and that "the processing of a request for separation in lieu of trial is not an extraordinary circumstance envisioned by R.C.M. 707(c)(8)". Accordingly, the military judge granted the accused's motion to dismiss all the charges against the accused and ordered them dismissed. The Government then appealed the ruling of the military judge in a timely manner in accordance with Article 62, U.C.M.J., and R.C.M. 908.

In *Miniclier,* this Court held that the accused's tender of resignation for the good of the service was neither an expressed or implied consent to or a request for a delay under R.C.M. 707(c)(3) nor did it generate a delay for good cause resulting from unusual circumstances under R.C.M. 707(c)(8). We upheld the military judge's ruling granting the accused's motion to dismiss the charges for lack of a speedy trial under R.C.M. 707 and dismissing the charges. The Government's appeal from that ruling was then denied by this Court. In support of our decision we cited *United States v. Burris,* 21 M.J. 140 (C.M.A. 1985); *United States v. O'Brien,* 22 22 U.S.C.M.A. 557, 48 C.M.R. 42 (1973); *United States v. Harris,* 20 M.J. 795 (N.M.C.M.R. 1985); *United States v. Kuelker,* 20 M.J. 715 (N.M.C.M.R. 1985); and *United States v. Fernandez,* 48 C.M.R. 460 (N.C.M.R. 1974).

The relevant time periods in the case before us are substantially similar to those which were before us in *Miniclier.* One aspect of the chronology of events pertinent to the issue before us in this case which was not before us in *Miniclier,* is that, here, on the 145th day[5] after charges had been preferred and when the Government was

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[5] Seven days of delay within this time period were chargeable to appellant pursuant to R.C.M. 707(c)(3).

first ready to proceed with its case, the appellant, through counsel, requested a delay in the trial of 22 days which was granted by the military judge. A second request for a delay of 20 more days was submitted by appellant's counsel and again granted by the military judge. This additional aspect in the case before us does not, however, give us pause. It is clear that the Government simply was not ready to bring appellant to trial within 120 days from the date charges were preferred against him as mandated by R.C.M. 707(a). Delays in the docketing of courts-martial are generally attributable to the Government. When an accused moves to dismiss charges against him or her for lack of a speedy trial, the Government has the burden of persuasion to justify why the case was not brought to trial within 120 days. Here, the Government failed to sustain that burden. The record of trial clearly shows it was unprepared to bring the appellant to trial within 120 days, and nothing had been done by appellant to adversely affect the Government's ability to prepare and be ready for trial within the time allowed—appellant's subsequent requests for delay notwithstanding. *United States v. Burris,* 21 M.J. 140 (C.M.A. 1985); *United States v. Cole,* 3 M.J. 220 (C.M.A. 1977); *United States v. Miniclier, supra.* See *United States v. Wolzok,* 1 M.J. 125 (C.M.A. 1975).

For the reasons stated in *Miniclier,* we find that the military judge in the case before us erred to the substantial prejudice of the appellant when he found that the delay resulting from the processing of appellant's tender of resignation for the good of the service was either a delay requested or consented to by appellant under R.C.M. 707(c)(3) or was a delay occasioned for good cause under R.C.M. 707(c)(8). Accordingly, the military judge's decision denying the appellant's motion to dismiss the charges

against him for lack of a speedy trial is reversed. The findings of guilty and the sentence are set aside and the charges are dismissed.

Judges MICHALSKI and MURDOCK concur.

OFFICIAL:

PAMELA HOWARD

PAMELA HOWARD
Captain, USAF
Chief Commissioner

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